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No. 92-991

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

FLORENCE L. KAUBISCH, ET AL.

Petitioners,

v.

STATE OF SOUTH DAKOTA,

Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of the State of
South Dakota

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I

WHETHER 43 U.S.C. § 912 APPLIES TO RIGHTS-OF-WAY GRANTED UNDER THE GENERAL RIGHT-OF-WAY ACT OF 1875 (43 U.S.C. § 934) AND TO THE REVERSIONARY RIGHTS OF THE PETITIONERS.

II

WHETHER AUTHORITY TO ABANDON A RAILROAD RIGHT-OF-WAY GRANTED BY THE INTERSTATE COMMERCE COMMISSION CONSTITUTES AN ACT OF CONGRESS UNDER 43 U.S.C. § 912.

III

WHETHER THE UNITED STATES, FOR PURPOSES OF 43 U.S.C. § 912, POSSESSES ANY "RIGHT, TITLE, INTEREST, AND ESTATE" IN LANDS OVER WHICH A RIGHT-OF-WAY HAS BEEN GRANTED UNDER THE GENERAL RIGHT-OF-WAY ACT OF 1875 WHEN THE UNITED STATES, SUBSEQUENT TO THE RIGHT-OF-WAY GRANT, HAS CONVEYED, WITHOUT RESERVATION, FEE TITLE TO THE UNDERLYING LAND.

IV

WHETHER A RECREATIONAL BICYCLE TRAIL CONSTITUTES A PUBLIC HIGHWAY FOR PURPOSES OF 43 U.S.C. § 912.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	11
REASONS FOR DENYING THE WRIT	14
1. THERE IS NO CONFLICT ON APPLICATION OF § 912 TO 1875 ACT CORRIDORS BETWEEN THE DECISION BELOW AND THOSE OF OTHER APPELLATE COURTS.	18
2. THERE IS NO CONFLICT ON WHETHER ICC ACTIONS CONSTITUTE ACTS OF CONGRESS BETWEEN THE DECISION BELOW AND THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR FEDERAL COURTS OF APPEALS.	23
3. THERE IS NO CONFLICT ON WHAT CONSTITUTES A PUBLIC HIGHWAY FOR § 912 PURPOSES BETWEEN THE CASE BELOW AND ANY CASE CITED BY THE PARTIES.	28

4. PETITIONERS HAVE NOT SHOWN AN ISSUE OF NATIONAL IMPORT. 30

CONCLUSION 31

TABLE OF AUTHORITIES

CASES:	PAGE
Allard Cattle Company v. Colorado and Southern Railway Company, 516 P.2d 123 (Colo. App. 1973)	18
Barney v. Burlington Northern, 490 N.W.2d 726 (1992)	1, 11
City of Aberdeen v. Chicago & North Western Transp. Co., 602 F.Supp. 589 (D.S.D. 1984)	21
Haack v. Burlington Northern, 28 S.D. L.Rev. 196 (1982)	3
Harris v. Ski Park Farms, Inc., 62 Wash.App. 371, 814 P.2d 684, pet. for rev. granted, 118 Wash.2d 1001, 822 P.2d 684 (1991)	24
Idaho v. Oregon Short Line Railroad Company, 617 F.Supp. 208 (D. Id. 1985)	PASSIM
Preseault v. ICC, 110 S.Ct. 914	11, 15, 16
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	16
State by Washington Wildlife Preservation, Inc. v. State, 329 N.W.2d 543 (Minn. 1983), cert. denied, 463 U.S. 1209 (1983)	10, 11
Stegman v. City of Fort Thomas, 273 Ky 309, 116 S.W.2d 649 (1938)	30

Vieux v. East Bay Regional Park District, 906 F.2d 1330 (9th Cir.), cert. denied, 111 S.Ct. 430 (1990) 17, 18, 22, 23

White v. Meadow Park Land Co., 249 Mo.App. 683, 213 S.W.2d 123 (1948) 30

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 16

STATUTORY REFERENCES:

S.D. Codified Laws Ann. § 49-16A-115 8, 9, 11

16 U.S.C. § 1247(d) 15

23 U.S.C. § 316 6, 7, 20, 31

43 U.S.C. § 912 PASSIM

43 U.S.C. § 913 PASSIM

43 U.S.C. § 934 2

OTHER AUTHORITIES:

61 Cong. Rec. H4496 (August 1, 1921) 19, 20

Cong. Rec. H8046 (May 31, 1920) 27

H.R. Rep. No. 851, 66th Cong., 2d Sess. 1, 2, 3 (1920) 26

S.Rep. No. 388, 67th Cong., 2d Sess. 1 (1922) 19

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STATE OF SOUTH DAKOTA,

Respondent.

Respondent State of South Dakota respectfully requests that this Court deny the petition for writ of certiorari sought by Petitioners Kaubisch, et al., seeking review of the decision and judgment of the South Dakota Supreme Court in Barney v. Burlington Northern, 490 N.W.2d 726 (1992).

STATEMENT OF THE CASE

This proceeding involves an historic rail corridor in the Black Hills of South Dakota, passing many points of interest and terminating in Deadwood.[1] The corridor was granted to Burlington Northern's predecessors in interest in the 1880's, principally under the General Right-of-Way Act of 1875, 43 U.S.C. § 934.[2] The railroad corridor was operated as a railroad subject to the supervision of the Interstate Commerce Commission (ICC), including ICC's abandonment jurisdiction. Burlington Northern Railroad

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[1] Cf. Burlington Northern Railroad Company -- Abandonment Exemption -- Fall River and Custer Counties, SD, AB-6 (Sub-no. 293X), served Jan. 4, 1989 (unpublished but available via Lexis-Trans library) (discussing ICC efforts to comply with National Historic Preservation Act in connection with the portion of the line between Edgemont and Custer).

[2] The General Railroad Right-of-Way Act was repealed by Pub.L. No. 94-579, 90 Stat. 2793 (1976).

(BN) obtained abandonment authorization from the ICC for the portion of the corridor involved in this proceeding in 1983. The State owns over one thousand miles of rail corridor. Some of this mileage is in use and some of it is being retained for possible future use. The State entered into negotiations to acquire the corridor in the Black Hills. Because the corridor was federally-granted, the State and BN acted pursuant to 43 U.S.C. § 912,[3] which governs the disposition of federally-granted rail corridors upon cessation of current rail use.

Insofar as relevant here, 43 U.S.C. § 912 provides that the owner of the legal subdivision traversed by a federally-granted

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[3]Additionally, South Dakota law relating to federally-granted corridors mirrors the provisions of 43 U.S.C. § 912 for disposition of such corridors upon cessation of rail use. SDCL 49-16A-115. See generally Note, Reversion of Railroad Right of Way in South Dakota after Haack v. Burlington Northern, 28 S.D. L.Rev. 196 (1982).

railroad right of way shall be "vested" with the landowner[4] but only (1) upon a declaration by a court of competent jurisdiction that the railroad has been abandoned or an Act of Congress declaring forfeiture, and then (2) only if a "public highway" is not established on the premises within one year of the judicial declaration or Act of Congress.[5] Other statutes --

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[4]If the railroad right of way is within the corporate limits of a municipality, 43 U.S.C. § 912 provides that the municipality acquires the land.

[5]43 U.S.C. § 912, certainly one of the longer sentences in the U.S. Code, provides as follows:

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and

(continued...)

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[5](...continued)
thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or (sic) forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assistance of any kind or nature whatsoever: Provided, That this section shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance is among those which have been or may after March 8, 1922, and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this section affect any

(continued...)

specifically 43 U.S.C. § 913 and 23 U.S.C. § 316 -- have long permitted federally-granted railroad rights of way to be used for any "public highway" purposes with the consent of the railroad prior to abandonment.[6]

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[5](...continued)
public highway on said right of way on March 8, 1922: Provided further, That the transfer of said lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

[6]43 U.S.C. § 913 provides as follows:

> All railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are hereby authorized to convey to any state, county or municipality any portion of such right of way to be used as a public highway or street: Provided, That no such conveyance shall have the effect to diminish the right of way of such railroad company to a less width than 50 feet on

(continued...)

Pursuant to 43 U.S.C. § 912, and prior to any judicial declaration of abandonment or Act of Congress signifying a forfeiture, the State acquired the Black Hills railroad corridor for "public highway" purposes as provided in 43 U.S.C. §§ 912 and 913, and 23 U.S.C. § 316.

In the proceeding below, several landowners adjacent to the corridor asserted ownership interests in parcels within the corridor, arguing that rail use of the corridor had ceased and the parcels had automatically reverted to them notwithstanding 43 U.S.C. § 912 and applicable state law. In October of 1987, several such owners filed a quiet title action in State court, asserting ownership of several parcels in the corridor. The State of South Dakota intervened. The

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[6](...continued)
each side of the center of the main track of the railroad as now established and maintained.

parties agreed that there were no genuine issues of material fact in this matter, which would permit the case to be summarily resolved. On motion for summary judgment, the Circuit Court of the Seventh Judicial Circuit found that 43 U.S.C. § 912 was applicable; that there had heretofore been no declaration or decree of forfeiture or abandonment by a court or Congress; and that the adjacent owners' alleged reversionary interest did not vest because the State had developed a "public highway" on the corridor within the one year period provided by § 912 and the applicable State statute, S.D. Codified Laws Ann. § 49-16A-115.

In an opinion filed September 9, 1992, the South Dakota Supreme Court unanimously affirmed the trial court's rulings. The Court found that (a) federal law governed the construction of the interest conferred on railroads under the 1875 Right of Way Act, (b)

43 U.S.C. § 912 applied to that interest, (c) § 912 specifically provides that adjacent owners have no vested "reversion" until a judicial declaration of abandonment or a Congressional Act determining forfeiture and then only if a "public highway" had not been established within one year. South Dakota's highest Court also found and affirmed that the State had established a "public highway" before or within the requisite one year period.

South Dakota statutory law mirrors the federal scheme of disposition provided in 43 U.S.C. § 912. In particular, S.D. Codified Law Ann. § 49-16A-115 provides for disposition of federally-granted corridors under § 912. Since the rail corridor in the proceeding below had been preserved in accordance with 43 U.S.C. § 912 and its State counterpart, the South Dakota Supreme Court ruled that the adjacent landowners were not entitled to any

compensation on the theory that their reversionary interest in parcels within the rail corridor had somehow been "taken."

The South Dakota Supreme Court also adopted the reasoning of the Minnesota Supreme Court in State by Washington Wildlife Preservation, Inc. v. State, 329 N.W.2d 543, 546 (Minn. 1983), cert. denied, 463 U.S. 1209 (1983). The court below held that since a railroad is one kind of public highway, and use of a rail corridor for another public highway purpose is "compatible and consistent with its prior use as a public highway." Thus,

> [n]o greater burden has been placed on the servient estate. 'It has long been held that the holder of an easement is not limited to the particular method of use in vogue when the easement was acquired, and that other methods of use in aid of the general purpose of which the easement was acquired are permissible.'

Barney v. Burlington Northern, 490 N.W.2d at 733, quoting Washington Wildlife, supra, 329 N.W.2d at 546. This portion of the South Dakota Supreme Court's decision serves as a State law ground, in addition to 43 U.S.C. § 912 and S.D. Codified Law Ann. § 49-16A-115, for allowing use of the rail corridor as a public highway. It is not challenged or otherwise questioned in the petition for certiorari filed herein.[7]

SUMMARY OF ARGUMENT

There is no conflict among the circuits nor federal question of magnitude sufficient to warrant invocation of this Court's

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[7]In Preseault v. ICC, 110 S.Ct. 914, 924 (1990), this Court unanimously recognized that "[s]ome state courts have held that trail use does not constitute abandonment of a right-of-way for public travel so as to trigger reversionary interests" citing, inter alia, Washington Wildlife, supra, 329 N.W.2d 543, 545-48, also indorsed by the South Dakota Supreme Court. See also Preseault, supra, 110 S.Ct. at 926 (concurring opinion of Justice O'Connor referencing Washington Wildlife).

jurisdiction. Petitioners do not challenge the constitutionality of the relevant federal statute -- 43 U.S.C. § 912 -- or its application here. They merely raise issues of statutory construction, not of constitutional dimension, on which there is no conflict among appellate courts in this country. In any event, in light of the independent State law basis for the decision, even if all the federal questions were resolved contrary to the unanimous opinions of the other federal appellate or state supreme courts that have considered them, the result would not change.

There are three basic issues relating to the construction of 43 U.S.C. § 912 embodied in the four questions framed by Petitioners: (1) whether 43 U.S.C. § 912 applies to 1875 Act corridors, (2) whether ICC abandonment authorization amounts to a judicial declaration or Act of Congress, and (3) whether recreational trails can be "public

highways." Petitioners' position on these issues lacks merit.

43 U.S.C. § 912 on its face is applicable to all federally granted railroad rights of way, including 1875 Act corridors. This conclusion is supported by all federal courts of appeals or state supreme courts that have considered the issue. It is also consistent with the construction of 43 U.S.C. § 912 most recently adopted by the Solicitor of the United States Department of the Interior.

Similarly, all state courts of last resort and federal courts of appeals that have considered the issue concur that an ICC abandonment authorization does not constitute a judicial declaration or Act of Congress for purposes of triggering the vesting of reversionary interests under 43 U.S.C. § 912. ICC merely authorizes an abandonment; its abandonment license is permissive, not determinative. In contrast, a judicial

declaration or Congressional Act as envisioned in 43 U.S.C. § 912 is determinative.

Finally, a "public highway" is unequivocally broad enough to encompass pedestrian or equestrian facilities open to the general public for transit purposes, both under the law of South Dakota and common and statutory law generally. Until the advent of the railroad in the mid-1800's, all land-based public highways (including those that were federally funded) were pedestrian/equestrian facilities. Certainly the concept of public highway includes facilities, such as that envisioned here, which will also support motorized snowmobiles and maintenance equipment.

REASONS FOR DENYING THE WRIT

Under Supreme Court Rule 10.1, a petition for certiorari "will be granted only when there are special and important reasons therefor." Petitioners have cited no special

or important reasons. The gravamen of their argument is a syllogism as follows: (a) conserving rail corridors is "increasingly popular,"[8] (b) this Court considered the application of the 1983 Trails Act Amendments (in particular, 16 U.S.C. § 1247(d)) in Preseault v. ICC, 110 S.Ct. 914, (c) 43 U.S.C. § 912 also permits preservation of corridors, and (d) this Court therefore should have a look at § 912. Cert. pet. at 7. This hardly is a demonstration of significance for purposes of review.

Petitioners do not challenge the constitutionality of 43 U.S.C. §§ 912 or 913, either in the abstract or as applied. If they

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[8]Preservation has always been important in agricultural states such as South Dakota, which have been hard-pressed by thousands of miles of ICC abandonment authorizations threatening present and future transport of agricultural commodities. South Dakota has responded in part with acquisition of over 1000 miles of rail corridor for current or future operation, or for other public highway purposes.

did, no such challenge would be credible.[9] Eschewing any frontal assault on 43 U.S.C. §§ 912 and 913, Petitioners have adopted the limited position that 43 U.S.C. § 912 is

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[9]43 U.S.C. §§ 912 and 913 are within the power of Congress under the Commerce Clause under the reasoning of this Court in Preseault, supra, 110 S.Ct. at 924-25. Additionally, other Constitutional provisions could be invoked for this Congressional action. The legislative history behind 43 U.S.C. 912 makes clear that Congress was vitally concerned that federally-granted rail corridors be preserved for all "public highway" purposes, even if non-rail. As corridors become increasingly difficult to assemble in our growing nation, and as more and more rail corridors have been threatened with loss, Congress has adopted measures reaffirming the desirability of retaining rail corridors for other transportation purposes, and for future rail use, through such statutes as 16 U.S.C. § 1247(d) (adopted in 1983), and 16 U.S.C. § 1248(c)-(g) (adopted in 1988).

In the doubtful circumstances where application of 43 U.S.C. §§ 912 and 913 could result in a "taking," the Tucker Act, 28 U.S.C. §§ 1491(a) & 1346(a)(2), is presumptively applicable to provide a "just compensation" remedy. E.g., Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-95 (1985).

constructively inapplicable here. They have attempted to conjure up conflicts in decisions on two issues involving the application of § 912, which they argue warrant review. On the third issue (scope of the term "public highway"), they have thus far not even attempted to articulate a conflict.

Petitioners' purported conflicts are more illusory than real. The leading federal appellate decision considering § 912 is Vieux v. East Bay Regional Park District, 906 F.2d 1330 (9th Cir.), cert. denied, 111 S.Ct. 430 (1990). That decision is fully in accord on the relevant issues addressed by the South Dakota Supreme Court below. In particular, the Ninth Circuit determined (1) 43 U.S.C. § 912 applies to 1875 Act rail corridors and (2) an ICC abandonment authorization does not constitute a judicial determination of actual abandonment, or an Act of Congress triggering

the final one year period for establishment of a public highway under § 912.

1. There is no conflict on application of § 912 to 1875 Act corridors between the decision below and those of other appellate courts. The South Dakota Supreme Court's determination that 43 U.S.C. § 912 applies to 1875 Act rights of way is consistent not only with Vieux, supra, but also with the views of all other appellate courts that have addressed the issue. E.g., Allard Cattle Company v. Colorado and Southern Railway Company, 516 P.2d 123, 125 (Colo. App. 1973).

Section 912 on its face applies to all federally-granted rail corridors. Congress did not distinguish pre-1875 Act from 1875 Act rail lines. Whether 1875 Act, or pre-1875, Congress provided for use of all federally-granted rail corridors for other public highway purposes. The relevant legislative history states categorically that Congress

wanted to "safeguard" the "right . . . to establish highways on such [rail corridors] as may be abandoned in the future." S.Rep. No. 388, 67th Cong., 2d Sess. 1 (1922). Congressman Burtness explained that the intent was to permit the land to "revert" to the person "who already received the patent on the entire legal subdivision [but] [w]ith this exception, namely, that the Committee put in an amendment . . . that will save the use of these rights of way for public highways." 61 Cong. Rec. H4496 (August 1, 1921). Congressman Burtness explained that

> The gentlemen will readily realize that in some cases where the railroad has been actually established and then abandoned it makes a very good foundation for a public highway.
>
> Members of the committee knew of several such cases, so realizing that highways were of public importance they made an exception in the bill, so that any part that is used for a public highway is expressly reserved. Likewise it gives to the public authorities in charge of the establishment of

> highways the opportunity to establish a legal highway thereon within one year after the decree or forfeiture or abandonment.

Id. at 4496.

This construction of 43 U.S.C. § 912 compares favorably with the two most closely related statutes, 43 U.S.C. § 913 and 23 U.S.C. § 316. These two provisions, adopted almost three quarters of a century ago, authorize establishment of other public highways in federally-granted rail corridors. No one has heretofore taken the position that these latter statutes do not apply to 1875 Act corridors, which constitute the bulk of federally-granted railroad rights of way. If 43 U.S.C. § 913 and 23 U.S.C. § 316 apply to 1875 Act corridors, but § 912 does not apply, then all public highways located in such corridors are trespassers upon abandonment. This would be a blundering and disruptive

result, as intimated by Congressman Burtness in the legislative history quoted above.

City of Aberdeen v. Chicago & North Western Transp. Co., 602 F.Supp. 589 (D.S.D. 1984), the one case on which Petitioners rely, was predicted on the notion that the 1875 Act conferred only easement-type interests and that once the federal government conveyed the underlying fee, the United States lost all interest in the 1875 Act corridor. The Aberdeen court never considered whether the easement-type interest granted in the 1875 Act was congressionally intended to encompass other transportation uses.

Aberdeen is unique. It is the only reported decision suggesting that 43 U.S.C. § 912 does not apply to 1875 Act corridors. Shortly after Aberdeen was decided, the district court in Idaho v. Oregon Short Line Railroad Company, 617 F.Supp. 208 (D. Id. 1985), explained that the legislative history

of the statute indicated that Congress clearly intended § 912 to be applicable to all federally-granted rail corridors: "Congress clearly believed that it had authority over 1875 Act railroad rights-of-way." 617 F.Supp. at 212. The district court in Oregon Short Line, supra, explained that Congress intended something more than a mere railroad interest in adopting the 1875 Act:

> Even if the 1875 Act granted only an easement, as opposed to a higher right-of-way interest, Congress had authority, by virtue of its broad power over interstate commerce, to grant such easements subject to its own terms and conditions -- which were to preserve a corridor of public transportation, particularly the railroad transportation, in order to facilitate the development of the 'Western vastness.'

Id., 617 F.Supp. at 212.

The Ninth Circuit reinforced this holding in Vieux, supra, decided five years later. The Interior Department, which administers most public lands other than the national

forests, has cited Idaho v. Oregon Short Line Railroad Company, supra, with approval for the proposition that "the 1875 Act anticipated a retained interest in the United States in addition to mineral rights."[10] In short, all appellate decisions as well as the legal position of the relevant administrative agency are consistent with the view that § 912 applies to 1875 Act rail corridors. The decision of the South Dakota Supreme Court comports with Idaho Short Line, Vieux, and the Interior Department's most recent construction of the nature of interests in 1875 Act corridors.

2. There is no conflict on whether ICC actions constitute Acts of Congress between the decision below and the decisions of other state courts of last resort or federal courts of appeals. Petitioners cite one case for the

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[10]Memorandum M-36964, Acting Solicitor to Assistant Secretary, Jan. 12, 1989, at 11.

proposition that an ICC authorization constitutes an "Act of Congress" for purposes of § 912 -- the decision of the Washington Court of Appeals in Harris v. Ski Park Farms, Inc., 62 Wash.App. 371, 814 P.2d 684 (1991). A petition to review that decision was, however, granted by the Washington Supreme Court at 118 Wash.2d 1001, 822 P.2d 684 (1991), and the case, which has been argued, is still awaiting decision.[11] Thus, the ultimate precedential value is not yet clear.

In any event, the reasoning of the state court of appeals is incorrect. That court never examined § 912 in detail, and did not refer to its legislative history. Its only reasoning was that since Congress has granted certain abandonment jurisdiction to ICC, its determinations are the equivalent of an "Act of Congress." ICC may authorize abandonment,

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[11]Tel. conf. Office of Clerk, Olympia, and Charles Montange December 29, 1992.

but for any number of reasons, the abandonment may never be consummated. Some such reasons are sale of the rail line to another freight carrier under ICC jurisdiction; sale of the rail line as a private freight railroad to another company; transfer of the line to a state for operation under ICC's "modified certificate" program; sale of the rail line for passenger service -- which is generally not ICC regulated; use of the rail line for storage of cars; sale of the line for excursion rail use.

The legislative history of § 912 makes clear that Congress wanted "reversions" to be triggered by a formal determination by a court of actual abandonment or an Act of Congress decreeing forfeiture of a charter. Indeed, the pertinent House Report states that the language of the statute was modified

> so it may be clear vesting of title in the landowner and his right to occupy and use the same shall only

> occur after there has been a forfeiture of the right of the railroad company or when an abandonment has been actually ascertained and decreed. The bill [as it previously stood] might [have been] construed to leave the determination of abandonment to the landowner, which is manifestly unworkable.

H.R. Rep. No. 851, 66th Cong., 2d Sess. 1, 2, 3 (1920) (emphasis added). The "reversion" was not to be triggered in some automatic sense whenever a claimant felt he or she was entitled to the property, but only on actual abandonment or forfeiture. The House debate is especially clear on this point:

> MR. GARD. The objection which was in my mind was that without any process by anybody, except the proof of the matter of abandonment, the title to this land vested in some subdivision which was outside a municipality, and simply because a man might own a piece of ground contiguous to this abandoned land, by virtue of the ownership and no other action he became entitled to this abandoned land. It seems to me there ought to be some approval by some one (sic) who has charge of the land rather than have the automatic addition to the man's own land.

> MR. CHRISTOPHERSON. This does not do that automatically. The bill was originally drawn so that it would automatically do it, but by the suggestion of the department there was a committee amendment which has been submitted by the committee and which I will read --
>
> > Whether by forfeiture or by abandonment by said railroad company, declared or decreed by a court of competent jurisdiction or by act of Congress.
>
> With that amendment, the parties would either have to go into court and get a decree declaring the land forfeited in a competent court or by special act of Congress. . . .

59 Cong. Rec. H8046 (May 31, 1920) (emphasis added).

Since an ICC authorization for abandonment is merely permissive and neither requires a line to be abandoned, nor constitutes a determination that a line in fact is abandoned, it has nothing to do with the "Act of Congress" language in § 912. Interestingly, in Idaho v. Oregon Short Line

Railroad, supra, the district court held that § 912 applies to 1875 Act corridors. In a companion case the same district court held that even though ICC had authorized an abandonment, the line was not abandoned for purposes of § 912 because the railroad was continuing to use the corridor for side track and storage purposes. Idaho v. Oregon Short Line, 617 F.Supp. 213 (D. Id. 1985). In short, there is clearly a distinction between an ICC authorization and a determination of actual abandonment or forfeiture by a court or Act of Congress.

3. There is no conflict on what constitutes a public highway for § 912 purposes between the case below and any case cited by the parties. Petitioners do not suggest any conflicts with the definition of "public highway" used by the South Dakota Supreme Court. They also fail to articulate any rationale why the definition should be

other than that used by the court below. All authorities that have considered the question adhere either to local state law as determining what constitutes a public highway, or to the common law definition of public highway. As the South Dakota Supreme Court held, the facility South Dakota is establishing on the rail corridor readily meets South Dakota's definition of a "public highway." The common law definition -- indeed, the dictionary definition -- is any way open to the public.[12] In the court below, Respondent understood Petitioners to argue that "public highways" could not be primarily recreational. There are, however, many public highways, particularly in a tourist area such as the Black Hills, that are primarily recreational. Even railroads have

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[12] E.g., Webster's New Collegiate Dictionary at 536 (1981); Black's Law Dictionary 656 (5th ed. 1979).

been built primarily for recreational purposes. There is no "non-recreational" implied limitation on the term "public highway."[13]

4. Petitioners have not shown an issue of national import. In light of the argument set out above, it is plain that the issue of interpretation of 43 U.S.C. § 912 is not of great importance at this time. No other appellate courts of last resort or federal courts of appeals have taken a contrary position, and the issue has been infrequently litigated. It may be that this case

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[13] E.g., Stegman v. City of Fort Thomas, 273 Ky 309, 116 S.W.2d 649, 651 (1938) ("a street use only by pedestrians is a public highway"); White v. Meadow Park Land Co., 249 Mo.App. 683, 213 S.W.2d 123, 125 (1948) (chief criterion of public highway is that it is a transportation route available to public at large). "The term 'highway' is generic and includes all public roads and ways. . . . A way is not any less a public highway because it is to be used for purposes of pleasure and recreation only." 39 Am.Jur.2d section 1, at pp. 401 & 402.

constitutes the only real test of 43 U.S.C. § 912 as a vehicle for "Rail to Trail" conversions. The statute might eventually be of importance in such cases, or it might not. Even if this Court believes that it may ultimately have to resolve the issue, the law ought to be permitted to develop beyond the point where there are only a handful of cases, all of which are in agreement with the decision below.

CONCLUSION

There is no conflict between the circuits or state courts of last resort on the issues decided by the South Dakota Supreme Court below. That decision is consistent with the leading federal decisions. Further, the State's highest court has not engaged in any new or novel departures from 43 U.S.C. § 912 or the related provisions of 43 U.S.C. § 913 or 23 U.S.C. § 316. The decision below is also supported by state law grounds. The

South Dakota Supreme Court's reasoning and result are supported by the language of the statute and its legislative history. The petition for certiorari should, thus, be denied.

Respectfully submitted,

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